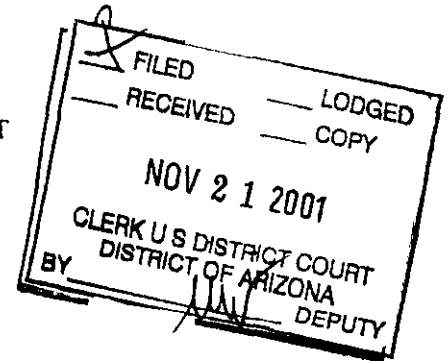


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA



MARK KOCH

Plaintiff,

vs.

SAMUEL LEWIS, et al.,

Defendants.

No. CIV. 90-1872 PHX-JBM

MEMORANDUM ORDER AND OPINION

On October 25, 2001, we directed defendants to respond to plaintiff's Notice of Non-compliance, "with a specific description of housing, out-of-cell time, congregate activity and outdoor recreation of both plaintiff and the general population in a maximum security institution." Defendants did respond, although we know little more from that response than we knew before. From that response and plaintiff's subsequent reply, the following appear to be a reasonably accurate description of plaintiff's present circumstances:

1. He is housed in a cell by himself. The cell has a window from which he can view the outside. We are not otherwise advised of its description. He eats all his meals there.
2. Plaintiff is out of his cell three hours a week. He is permitted then to exercise in a space adjacent to but separated from other spaces in which other inmates are exercising. He can have verbal and visual communications with them at that time.
3. He has no other congregate activity.
4. He has no outdoor recreation.
5. He may possibly be eligible for some correspondence courses.

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We are not told what the conditions are for most of the approximately 900 inmates at the facility. The description is limited to the conditions for plaintiff and for those others at that facility who are likewise being confined in near solitary confinement.

How did plaintiff end up with the placement? So far as we are able to determine from defendants' response, the rationale for that placement is as follows:

1. Plaintiff is a member of the Aryan Brotherhood. He cannot be housed with thirty-one identified inmates or others having security issues with the Aryan Brotherhood.
2. Plaintiff is a predator and a threat to other inmates, although there is no information of recent predatory behavior.
3. As a member of the Aryan Brotherhood, plaintiff would be at risk in the general population if he did not do the gang's bidding.
4. Plaintiff's classification score remains the highest, 5/5, because he is a member of the Aryan Brotherhood. He should be in SMU II, but, because of the court order, he has been transferred to an alternate high security facility in conditions of near solitary confinement, which is the appropriate housing assignment in the circumstances.

In view of what has happened, plaintiff asks the court to decide whether defendants' findings of plaintiff's gang membership in 1996 and 1998 were proper. We declined to do so earlier and we decline to do so now. It has been evident that if we decided that the findings were improper then defendants would hold another hearing, bolster the record with

additional evidence, and reach the same conclusion. We see no reason to engage in a useless exercise. Indeed, we are reinforced in that conclusion in light of defendants' present view of what constitutes compliance with the court's order. We adhere to the view that plaintiff, even if he was a member of the Aryan Brotherhood and has not renounced, cannot constitutionally be held indefinitely in virtual isolation because of his status and not because of any overt conduct.

And it is clear that plaintiff continues to be held in virtual isolation because of his presumed status and not because of any overt conduct. The record establishes that for a considerable number of years prior to plaintiff's confinement in SMU-II, he was housed in general population in various medium and maximum security institutions, while he was believed to be a member of the Aryan Brotherhood, without any gang related or predatory behaviors. Further, we are led to believe that only in Arizona, and only since 1997, have prisoners once housed in SMU-II type facilities because of gang affiliation been so held without prospect of return to any general population.

Again, we are mindful that we should not dictate where plaintiff is to be held. We are also mindful that prison authorities reasonably may be concerned with separating specific inmates for various reasons. We believe, however, that defendants' should be mindful of the thrust and dictates of the court's August 30, 2001 order. Plaintiff has recommended several specific remedial provisions, and they appear reasonable to implement the August 30, 2001 order. We withhold approval briefly, however, in order to give defendants an opportunity to

comment about them. They are directed to do so by November 28, 2001. Defendants do not agree with this court's decision and they have appealed, as is their right. They must, however, comply with it unless it is stayed by the Ninth Circuit or reversed on appeal.


James B. Moran
Senior Judge, U.S. District Court

Dated: November 19, 2001

Copies to all parties of record.